FOO AH KOW & ANOR v. YEAP POH LUM & ORS

COURT OF APPEAL, PUTRAJAYA
ZAHARAH IBRAHIM JCA
ANANTHAM KASINATHER JCA
UMI KALTHUM ABDUL MAJID JCA
[CIVIL APPEAL NO: P-02-2582-10-2011]
19 JUNE 2015

LAND LAW: *Title – Sale and purchase – Indefeasibility of title – Developer terminated sale and purchase agreement with defendants – Developer transferred strata title of apartment to plaintiffs after defendants obtained summary judgment for possession of apartment – Maxim nemo dat quod non habet – Whether applicable – Whether developer still had legal interest in apartment at point of transfer – Whether instrument of transfer executed by developer void – Whether plaintiffs registered proprietors of apartment – Whether plaintiffs' title or interest defeasible by virtue of s. 340(2)(b) of National Land Code*

This was an appeal against the High Court order allowing the application by the plaintiffs for a declaration that the plaintiffs were the registered and lawful owners of an apartment ('the apartment'). Briefly, the defendants had entered into a sale and purchase agreement ('SPA 1996') with the developer for the purchase of the said apartment. Under the said SPA 1996, the apartment was to be completed and handed over to the defendants within 36 months. However, the apartment was not completed within the stipulated period. By notice of vacant possession dated 27 April 2006, the defendants were informed by the developer that vacant possession of the apartment was now ready for delivery. But by this time there was a delay of 3,033 days. The defendants sent a notice dated 12 June 2006 informing the developer that as at that point of time, the developer owed the defendants the sum of RM114,735 as liquidated ascertained damages ('LAD') for the late delivery of the apartment. The defendants agreed to take possession of the house with the balance of the purchase price being deducted from the LAD. By a letter dated 20 June 2006, the developer demanded payment of the balance of 20% of the purchase price from the defendants. Subsequently, the developer terminated the SPA 1996. The developer then sold the apartment to one Sin Chee Hoon ('Sin'), who in turn sold the apartment to the plaintiffs under a sale and purchase agreement ('SPA 2007'). The defendants then filed an action against the developer, seeking an order for vacant possession of the apartment and obtained summary judgment against the developer. Meanwhile, the strata title for the apartment was issued on 23 October 2008 and the apartment was transferred to the plaintiffs by the developer. The plaintiffs filed an application by way of originating summons seeking a declaration that the plaintiffs were the registered owners of the apartment and that they were *bona fide* purchasers for valuable consideration. They

A contended that they were the legal and beneficial owners. The defendant counterclaimed for a declaration that the plaintiffs were not *bona fide* purchasers for value of the unit and sought that the registration of the plaintiffs as the proprietors of the unit be revoked. The High Court Judge found that there was nothing to show that the sale and purchase of the
B apartment between Sin and the plaintiffs were void or defective and held that the plaintiffs had obtained an indefeasible title to the apartment. Hence, this appeal. The issue that arose was whether the plaintiffs' title was defeasible as at the point in time when the plaintiffs were registered as the proprietors of the apartment, the plaintiffs knew that the defendants were the beneficial
C owners of the apartment and had in fact obtained summary judgment for possession of the apartment.

Held (allowing appeal; setting aside order of High Court)
Per Zaharah Ibrahim JCA delivering the judgment of the court:

D **(1)** The developer had no right to terminate the SPA with the defendants as they had paid all the amounts due except the last 20%. Clearly, the developer's notice for payment of the balance of 20% of the purchase price was an invalid notice as such balance was no longer due from the defendants in view of the fact that, at that point of time, the LAD due from the developer exceeded the amount outstanding from the
E defendants. The defendants were entitled to immediate vacant possession of the apartment when the notice dated 27 April 2006 was given by the developer. When the amount of the LAD due from the developer exceeded the amount of the balance of the purchase price due from the defendants, the defendants had become the beneficial owner of
F the apartment and the developer became in effect a constructive trustee for the defendants. (paras 34, 37 & 38)

(2) On the date when the developer purportedly sold the apartment to Sin, the defendants were already the beneficial owner of the apartment and the developer no longer had any legal interest in the apartment that it
G could transfer to Sin. The maxim *nemo dat quod non habet* applied. Consequently, the plaintiffs could not have acquired any interest in the apartment from Sin. (paras 39 & 40)

(3) The transfer of the strata title of the apartment was executed by the developer to the plaintiffs two months after the defendants obtained
H summary judgment for possession of the apartment. The plaintiffs' ignorance of the summary judgment proceedings was of no consequence as their solicitors had knowledge of the proceedings. The solicitors' knowledge must be deemed to be in the knowledge of the plaintiffs also as the summary judgment was in respect of the same apartment for which
I the solicitors were acting for the plaintiffs as well as the developer. The developer no longer "owned" the apartment at the point of the transfer. The instrument of transfer executed by the developer was a void

instrument. As such, the plaintiffs' title or interest purportedly conveyed by way of that void instrument was defeasible by virtue of s. 340(2)(b) of the National Land Code. (paras 41-44)

Bahasa Malaysia *Headnotes*

Ini adalah rayuan terhadap perintah Mahkamah Tinggi membenarkan permohonan plaintif-plaintif untuk deklarasi bahawa plaintif-plaintif adalah pemilik berdaftar dan sah sebuah pangsapuri ('pangsapuri'). Defendan-defendan telah memasuki satu perjanjian jual beli ('PJB 2006') dengan pemaju untuk pembelian pangsapuri tersebut. Di bawah PJB 1996 tersebut, pangsapuri akan siap sedia dan diserahkan kepada defendan-defendan dalam tempoh 36 bulan. Walau bagaimanapun, pangsapuri tidak disiapkan dalam tempoh yang ditetapkan. Melalui notis milikan kosong bertarikh 27 April 2006, defendan-defendan dimaklumkan oleh pemaju bahawa milikan kosong pangsapuri sudah siap sedia untuk penyerahan. Terdapat kelewatan 3,033 hari. Defendan-defendan menghantar notis bertarikh 12 Jun 2006 memaklumkan kepada pemaju bahawa pada waktu itu, pemaju berhutang sejumlah RM114,735 kepada defendan sebagai ganti rugi tentu dan ditetapkan (LAD) untuk penyerahan lewat pangsapuri. Defendan-defendan bersetuju untuk mengambil milikan rumah dengan baki harga belian ditolak daripada LAD. Melalui surat bertarikh 20 Jun 2006, pemaju meminta bayaran balik 20% harga belian daripada defendan-defendan. Seterusnya, pemaju menamatkan SPA 1996. Pemaju kemudiannya menjual pangsapuri itu kepada Sin Chee Hoon ('Sin'), yang seterusnya menjual pangsapuri itu kepada plaintif-plaintif di bawah satu perjanjian jual beli ('PJB 2007'). Defendan-defendan kemudiannya memfailkan tindakan terhadap pemaju, menuntut perintah milikan kosong pangsapuri dan memperolehi penghakiman terus terhadap pemaju. Dalam pada itu, hak milik strata pangsapuri itu dikeluarkan pada 23 Oktober 2008 dan pangsapuri itu dipindah milik kepada plaintif-plaintif oleh pemaju. Plaintif-plaintif memfailkan permohonan melalui saman pemula menuntut deklarasi bahawa plaintif-plaintif adalah pemilik berdaftar pangsapuri itu dan mereka adalah pembeli *bona fide* untuk satu nilai. Mereka menghujahkan bahawa mereka adalah pemilik sah dan benefisial. Defendan membuat tuntutan balas untuk deklarasi bahawa plaintif-plaintif bukan pembeli *bona fide* untuk satu nilai unit tersebut dan menuntut bahawa pendaftaran plaintif-plaintif sebagai pemilik unit dibatalkan. Hakim Mahkamah Tinggi mendapati bahawa tiada keterangan bahawa jual beli pangsapuri antara Sin dan plaintif-plaintif tak sah atau defektif dan memutuskan bahawa plaintif-plaintif telah memperolehi hak milik tidak boleh disangkal ke atas pangsapuri itu. Oleh itu, rayuan ini. Isu yang timbul adalah sama ada hak milik plaintif-plaintif boleh disangkal atas sebab pada waktu plaintif-plaintif didaftarkan sebagai pemilik pangsapuri itu, plaintif-plaintif mengetahui bahawa defendan-defendan adalah pemilik benefisial pangsapuri itu dan telah memperolehi penghakiman terus untuk milikan pangsapuri itu.

Diputuskan (membenarkan rayuan; mengetepikan perintah Mahkamah Tinggi)

Oleh Zaharah Ibrahim HMR menyampaikan penghakiman mahkamah:

(1) Pemaju tidak mempunyai hak untuk menamatkan PJB dengan defendan-defendan kerana mereka telah membayar segala jumlah yang terhutang kecuali baki 20%. Dengan jelasnya, notis bayaran 20% dari harga baki belian yang diberi oleh pemaju adalah notis yang tidak sah kerana baki tersebut tidak lagi dihutang oleh defendan-defendan memandangkan bahawa pada masa itu LAD yang terhutang oleh pemaju melebihi jumlah yang perlu dibayar oleh defendan-defendan. Defendan-defendan mempunyai hak untuk mendapatkan milikan kosong pangsapuri itu apabila notis bertarikh 27 April 2006 diberikan oleh pemaju. Apabila jumlah LAD yang terhutang daripada pemaju melebihi jumlah baki harga belian yang perlu dibayar oleh defendan-defendan, defendan-defendan telah menjadi pemilik benefisial pangsapuri itu dan pemaju menjadi seorang pemegang amanah konstruktif bagi pihak defendan-defendan.

(2) Pada tarikh pemaju menjual pangsapuri itu kepada Sin, defendan-defendan sudah menjadi pemilik benefisial pangsapuri itu dan pemaju tidak lagi mempunyai kepentingan undang-undang dalam pangsapuri itu untuk memindahkannya kepada Sin. Maxim *nemo dat quod non habet* diguna pakai. Oleh itu, plaintif-plaintif tidak mungkin memperolehi apa-apa kepentingan dalam pangsapuri itu daripada Sin.

(3) Pemindahan hak strata pangsapuri itu dilaksanakan oleh pemaju kepada plaintif-plaintif dua bulan selepas defendan memperolehi penghakiman terus untuk milikan pangsapuri itu. Kejahilan plaintif berkenaan prosiding penghakiman terus tidak mempunyai kesan kerana peguam mereka mempunyai pengetahuan berkenaan prosiding itu. Pengetahuan peguam harus disifatkan berada dalam pengetahuan plaintif juga kerana penghakiman terus adalah berkenaan pangsapuri yang sama di mana peguam yang bertindak bagi pihak plaintif juga bertindak bagi pihak pemaju. Pemaju tidak lagi "memiliki" pangsapuri itu pada masa pemindahan dilakukan. Instrumen pemindahan yang dilaksanakan oleh pemaju adalah instrumen yang tidak sah. Oleh itu, hak milik atau kepentingan plaintif-plaintif yang dilaksanakan melalui instrumen yang tidak sah itu dapat disangkalkan melalui s. 340(2)(b) Kanun Tanah Negara.

Case(s) referred to:

Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors and Other Appeals [2008] 4 CLJ 618 CA ***(refd)***

Legislation referred to:

Housing Development (Control and Licensing) Regulations 1989, Schedule H
National Land Code, s. 340(2)(b)

For the appellants - M Thayalan; M/s Thayalan & Assocs
For the respondents - Surinder Singh; M/s Ong & Manecksha

[Editor's note: For the High Court judgment, please see Yeap Poh Lum & Yang Lain lwn. Foo Ah Kow & Satu Lagi [2011] 1 LNS 1100 (overruled).]

Reported by Suhainah Wahiduddin

JUDGMENT

Zaharah Ibrahim JCA:

Introduction

[1] This was an appeal against the High Court order allowing the application by the plaintiffs commenced by way of originating summons (which was later converted into a writ action) for a declaration that the plaintiffs were the registered and lawful owners of an apartment with strata title bearing the registered address 45E-8-3, Menara Kuda Lari, Jalan Lahat, Penang (apartment).

[2] The parties will be referred to as they were in the High Court.

Evidence Before The High Court

[3] The defendants entered into a sale and purchase agreement dated 22 January 1996 (SPA 1996) with the developer, Ever Noble Sdn Bhd (developer) for the purchase of the apartment.

[4] SPA 1996 was drawn up and executed in accordance with Schedule H of the Housing Development (Control and Licensing) Regulations 1989. The purchase price was RM169,000. The defendants obtained a loan of RM144,000 from Hong Leong Bank (bank). The difference must have been paid to the developer by the defendants themselves.

[5] Under SPA 1996, the apartment was to be completed and handed over to the defendants within 36 months from the date of SPA 1996. In other words, the apartment was due for delivery to the defendants by 22 January 1999.

[6] However, the apartment was not completed within the stipulated period. It was only completed in 2006.

[7] By notice dated 14 April 2006 the developer notified the defendants to pay the balance of 20% of the purchase price under SPA 1996.

[8] By notice of vacant possession dated 27 April 2006, the defendants were informed by the developer that vacant possession of the apartment was now ready for delivery. By this time there was a delay of 3,033 days. This was not in dispute.

[9] The defendants, through their solicitors, sent a notice dated 12 June 2006 to the developer informing the developer that as at that point of time (the date of the notice), the developer owed the defendants the sum of RM114,735 as liquidated ascertained damages (LAD) for the late delivery of the apartment. The defendants agreed to take possession of the house with the balance of the purchase price being deducted from the LAD. They wanted the balance of the LAD to then be paid to them.

[10] The developer responded by letter dated 20 June 2006 claiming that a representative action was taken in 2001 by one UG Jayantha and one Lim Beng Poh who represented themselves and allegedly also represented all other purchasers against the developer which was subsequently settled by way of a consent order dated 9 September 2002. According to that letter, one of the terms of the consent order was that the purchasers agreed to abandon their respective rights to claim for LAD. However, the question of whether the defendants had authorised the two persons to represent them did not appear to have been pursued by any of the parties.

[11] By another letter dated the same date (20 June 2006) the developer demanded payment of the balance of 20% of the purchase price from the defendants, to be paid within 14 days, failing which the agreement would be determined and "we shall accordingly exercise our rights to forfeit 20% of the purchase price".

[12] By letter dated 19 July 2006, the developer wrote to the bank, referring to the information they received from the bank that the defendants' loan facility granted by the bank had been terminated. By then, according to the letter, the bank had released RM110,200 of the purchase price and after deducting the 20% that was to be forfeited due to the termination of SPA 1996 by the developer (amounting to RM33,800) the balance of monies "due to this unit" was RM101,400, This sum appeared to be the sum to be refunded to the bank upon the termination of SPA 1996.

[13] The developer then sold the apartment to one Sin Chee Hoon under an agreement dated 13 December 2006.

[14] Sin Chee Hoon, in turn, sold the apartment to the plaintiffs under a sale and purchase agreement dated 5 February 2007 (SPA 2007).

[15] The plaintiffs' purchase of the apartment was financed by means of a loan taken by the plaintiffs from Public Bank. The plaintiffs executed a facilities agreement with Public Bank. They also executed a deed of assignment and a power of attorney in favour of Public Bank. All of them were executed on 22 March 2007. At that point of time the apartment was still without strata title.

[16] By this time (22 March 2007), Messrs Ong and Maneksha had come on board and was acting as solicitors for the plaintiffs for the facilities agreement, the deed of assignment and the power of attorney.

[17] On 29 March 2007, the defendants filed Summons No. 52-905-2007 at the Sessions Court in Georgetown, Penang, against the developer, seeking an order for vacant possession of the apartment.

[18] About a week later, on 5 April 2007, the sale and purchase of the apartment between Sin Chee Hoon and the plaintiffs was completed.

[19] The developer engaged Messrs Ong and Maneksha as its solicitors to represent it in Summons No. 52-905-2007. The solicitors filed the developer's notice of appearance on 19 April 2007.

[20] The defendants obtained summary judgment against the developer on 26 June 2009. The developer's appeal to the High Court was dismissed. There appeared to be no further appeal against that decision.

[21] Meanwhile, the strata title for the apartment was issued on 23 October 2008 and the apartment was transferred to the plaintiffs by the developer on 27 August 2009 and was charged to Public Bank on the same date: two months after the summary judgment was obtained by the defendants.

[22] Upon the plaintiffs receiving a bailiff's notice dated 27 July 2010 to deliver up vacant possession of the apartment to the defendants, the plaintiffs filed an application by way of originating summons dated 29 July 2010 seeking for a declaration that the plaintiffs were the registered owners of the apartment and for an order to restrain any parties from executing the Sessions Court Order in Suit No. 52-905-2007 dated 26 June 2009 against the plaintiffs.

[23] The plaintiffs claimed that they were *bona fide* purchasers for valuable consideration. They had bought the unit from Sin Chee Hoon pursuant to an agreement dated 5 February 2007 and had fully paid for that purchase. They contended that they became the legal and beneficial owners upon completion of that agreement.

[24] The defendants counterclaimed for a declaration that the plaintiffs were not *bona fide* purchasers for value of the unit and sought that the registration of the plaintiffs as the proprietors of the unit be revoked and that the defendants be registered as proprietors of the unit.

High Court Decision

[25] The learned High Court Judge was of the view that the developer had no right to terminate the sale and purchase agreement with the defendants as the defendants were in fact withholding the final progress payment due to the 3,033 day delay in the completion of the apartment as the amount due could be set off from the LAD payable under SPA 1996.

[26] However, the learned High Court Judge was of the view that the termination issue was an issue which was relevant only as between the defendants and the developer.

[27] As between the plaintiffs and the defendants, the issue for determination, according to the learned High Court Judge, was whether the plaintiffs had obtained an indefeasible title to the apartment upon their registration as the proprietors of the apartment on 27 August 2009.

[28] The learned High Court Judge held that there was nothing to show that the sale and purchase of the apartment between Sin Chee Hoon and the plaintiffs was void or defective. There was also nothing to show that the deed of assignment executed by Sin in the plaintiffs' favour was void or defective.

[29] The learned High Court Judge therefore held that the plaintiffs had obtained an indefeasible title to the apartment.

Before The Court Of Appeal

[30] The main issue before us was whether the plaintiffs' title was defeasible as at the point in time that the plaintiffs were registered as proprietors of the apartment the plaintiffs knew that the defendants were the beneficial owners of the apartment and had in fact obtained summary judgment for possession of the apartment.

[31] For the plaintiffs it was argued that they did not have knowledge of the previous sale to the defendants. They purchased the apartment from Sin Chee Hoon and they had fully paid the purchase price.

[32] The defendants however submitted that at the latest by the time Messrs Ong and Maneksha filed the Notice of Appearance in Summons No. 52-905-2007 on 19/04/2007, Messrs Ong and Maneksha knew of the earlier sale to the defendants. As they were also by then solicitors for the plaintiffs, their knowledge must also be attributed to the plaintiffs.

[33] Therefore, the defendants submitted, that the transfer of the apartment by the developer to the plaintiffs was void and was thus defeasible.

Decision

[34] We noted that the learned High Court Judge, as mentioned above, found that the developer had no right to terminate the SPA with the defendants as they had paid all the amounts due except the last 20% which was withheld by the defendants as by them the LAD due to them from the developer exceeded the amount of the 20%. Their position was they were entitled to have the balance of 20% of the purchase price set off from the amount of LAD due to them.

[35] We agreed with that finding.

[36] This court in *Sentul Raya Sdn Bhd v. Hariram Jayaram & Ors and Other Appeals* [2008] 4 CLJ 618 held, at p. 629, as follows:

> [17] We now turn to the cross appeals. In four of the appeals before us the High Court refused to award the respondents liquidated damages for the period until they obtained actual vacant possession of their respective

apartments. The factual position is this. The appellant gave each respondent concerned notice that vacant possession was available. Each notice was accompanied by a statement of the balance sum due from each respondent to the appellant. However there was at the material time liquidated damages owing from the appellant to the relevant respondents. These damages exceeded, in each case, the sum owing from the respondents to the appellant. The respondents were entitled to a set off the sums owing to them against the sums owing by them. See, *S.E.A Housing Corp. Sdn Bhd v. Lee Poh Choo* [1982] CLJ 355; [1982] CLJ (Rep) 305. Accordingly, in our judgment, the notices relied upon by the appellant were clearly invalid because delivery of vacant possession in each case was predicated upon the payment of a sum not due. The relevant respondents were therefore entitled to continue to claim liquidated damages until they took possession of the keys to their respective apartments.

[37] Clearly, the developer's notice for payment of the balance of 20% of the purchase price was an invalid notice as such balance was no longer due from the defendants in view of the fact that at that point of time the LAD due from the developer exceeded the amount outstanding from the defendants. The defendants were entitled to immediate vacant possession of the apartment when the notice dated 27 April 2006 was given by the developer.

[38] In our view, from that point of time when the amount of the LAD due from the developer exceeded the amount of the balance of the purchase price due from the defendants, the defendants had become the beneficial owner of the apartment and the developer became in effect a constructive trustee for the defendants.

[39] In the circumstances of this case, therefore, on the date when the developer purportedly sold the apartment to Sin Chee Hoon, the defendants were already the beneficial owner of the apartment and the developer no longer had any legal interest in the apartment that it could transfer to Sin Chee Hoon. In our view the maxim *nemo dat quod non habet* applied.

[40] Consequently, the plaintiffs could not have acquired any interest in the apartment from Sin Chee Hoon.

[41] The transfer of the strata title of the apartment was executed by the developer to the plaintiffs some two months after the defendants obtained summary judgment for possession of the apartment. At this point of time, Messrs Ong and Maneksha knew of the defendants' beneficial interest in the apartment.

[42] We agreed with the defendants that the plaintiffs' ignorance of the summary judgment proceedings was of no consequence as their solicitors, Messrs Ong and Maneksha, had knowledge of the proceedings. The solicitors' knowledge must be deemed to be the knowledge of the plaintiffs

A also as the summary judgment was in respect of the same apartment for which Messrs Ong & Maneksha was acting for the plaintiffs as well as the developer.

[43] In our considered view, as the developer (who transferred the strata title to the plaintiffs) no longer "owned" the apartment at the point of the
B transfer, the instrument of transfer executed by the developer was a void instrument.

[44] As such, the plaintiffs' title or interest purportedly conveyed by way of that void instrument was defeasible by virtue of s. 340(2)(b) of the
C National Land Code.

[45] We therefore unanimously allowed the appeal by the defendants and set aside the order of the High Court. Consequently, we allowed the counterclaim of the defendants as prayed in para. 26 of their affidavit in reply in the High Court.

D **[46]** In the circumstances of this case, we did not think that an order for costs was appropriate. We therefore made no order as to costs.

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